PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Chaudhery, 2016 NSPC 3

Date: January 13, 2016
Docket: 2610442; 2610443
Registry: Halifax

Between:

Her Majesty the Queen

V.

Abid Ali Chaudhery

DECISION ON TRIAL

Judge:	The Honourable Judge Marc C. Chisholm
Heard:	April 2, 2015; May 13, 2015; August 18, 2015; October 27, 2015; December 16, 2015
Decision:	January 13, 2016
Charge	Sections 253(1)(a); 253(1)(b) *Criminal Code*
Counsel:	Brian Cox, for the Crown (Blended Voir Dire) Rick Woodburn, for the Crown (Trial Proper) Ian Hutchison, for the Defendant

[3]

By the Court:

Introduction

Abid Ali Chaudhery is charged that he on or about the 9th day of June, 2013, at, or near Halifax, Nova Scotia, did have the care or control of a motor vehicle while his ability to operate a motor vehicle was impaired by alcohol or drug, contrary to Section 253(1)(a) of the *Criminal Code*; and further at the same time and place aforesaid, did unlawfully have the care or control of a motor vehicle having consumed alcohol in such a quantity that the concentration thereof in his blood exceeded 80 milligrams of alcohol in 100 millilitres of blood, contrary to Section 253(1)(b) of the *Criminal Code*.

The accused entered pleas of not guilty.

The trial began with a voir dire in relation to a Defence Charter motion alleging a lack of reasonable grounds for the breath demand, the decision, issued June 17, 2015, is reported at 2015 NSPC 93.

By agreement of counsel the evidence on the Charter voir dire was accepted as evidence on the trial. In addition to the Charter voir dire evidence, the Court heard additional testimony on the trial from the arrest/demand officer, Cst. Waldorf,

evidence of the qualified technician, Cst. Hillier, expert evidence of toxicologist, Josette Hackett, and evidence of Cst. MacIsaac and Cst. McCormick.

The evidence established that at about 2:40 am on June 9, 2013, the accused Abid Chaudhery was driving a motor vehicle which was stopped by Cst. Waldorf of the Halifax Regional Municipality Police Service. Based upon his observations of the accused, Cst. Waldorf formed the belief that the accused's ability to operate a motor vehicle was impaired by alcohol. Cst. Waldorf gave the accused a demand to provide breath samples pursuant to s. 254(3) of the *Criminal Code*. The accused was transported to the Halifax police station where, after speaking with counsel, he was taken to a breath testing room and introduced to qualified technician, Cst. Hillier.

After completion of the breath testing, Cst. Waldorf made arrangements for the accused to be picked up at the police station by his sister and released him from police custody.

A very short time later, patrol officers MacIsaac and McCormick were called to the front lobby of the police station where they met the accused. Based upon their observations of the accused they each concluded that he was intoxicated and since

[2]

he refused to leave he was arrested for a violation of s. 87 of the *Liquor Control Act* of Nova Scotia, for being intoxicated in a public place.

The Defence did not call evidence.

S. 253(1)(b) offence

Issue: Has the Crown proven beyond a reasonable doubt that at the time he was in control of a motor vehicle the accused's ability to operate a motor vehicle was impaired by alcohol?

In attempting to prove that at the time the accused was in care or control of a motor vehicle his blood alcohol exceeded 80 mg% the Crown relied on the Certificate of Qualified Technician, Exhibit VD1 and, the presumption in s. 258(1)(c), and alternatively, on the expert evidence of Josette Hackett extrapolating the result of the accused's breath sample at 4:35 am back to the time of the care or control.

Section 258(1)(c) states:

> 258. (1) In any proceedings under subsection 255(1) in respect of an offence committed under section 253 or subsection 254(5) or in any proceedings under any of subsections 255(2) to (3.2),
>
> (c) where samples of the breath of the accused have been taken pursuant to a demand made under subsection 254(3), if
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> (i) [Repealed before coming into force, 2008, c. 20, s. 3]

[2]

(ii) each sample was taken as soon as practicable after the time when the offence was alleged to have been committed and, in the case of the first sample, not later than two hours after that time, with an interval of at least fifteen minutes between the times when the samples were taken,

(iii) each sample was received from the accused directly into an approved container or into an approved instrument operated by a qualified technician, and

(iv) an analysis of each sample was made by means of an approved instrument operated by a qualified technician,

evidence of the results of the analyses so made is conclusive proof that the concentration of alcohol in the accused's blood both at the time when the analyses were made and at the time when the offence was alleged to have been committed was, if the results of the analyses are the same, the concentration determined by the analyses and, if the results of the analyses are different, the lowest of the concentrations determined by the analyses, in the absence of evidence tending to show all of the following three things — that the approved instrument was malfunctioning or was operated improperly, that the malfunction or improper operation resulted in the determination that the concentration of alcohol in the accused's blood exceeded 80 mg of alcohol in 100 mL of blood, and that the concentration of alcohol in the accused's blood would not in fact have exceeded 80 mg of alcohol in 100 mL of blood at the time when the offence was alleged to have been committed;

The evidence established proof beyond a reasonable doubt that the accused was in care or control of a motor vehicle on the morning of June 9, 2013. The timing of the accused being in care or control will be addressed later in these reasons.

Pursuant to a demand made to him by Cst. Waldorf under Section 254(3) of the *Criminal Code*, the accused provided samples of his breath.

Cst. Hillier, the qualified technician, testified, that six attempts were made to obtain a proper sample of the accused's breath with the results being:

1. 4:00 am an invalid sample was received;

2. At 4:06 am a valid (“proper”, “good”) sample was received, the result of the analysis of which was a blood alcohol reading of 160 mg%;
3. At 4:26 am an invalid sample was received;
4. At 4:31 am an invalid sample was received;
5. At 4:35 am a valid sample was received, the result of the analysis of which was a blood alcohol reading of 130 mg%;
6. At 4:53 am a valid sample was received, the result of the analysis of which was a blood alcohol reading of 130 mg%.

Cst. Hillier testified that it was standard practice to take a third breath sample when there was a variance of greater than 20 mg% on the first two samples. This was to ensure the approved instrument was working correctly even though no ERROR message had been received.

Ms. Josette Hackett was accepted by the Court as an expert in the following areas:

1. The absorption, distribution and elimination of alcohol in the human body;
2. The measurement of alcohols in bodily fluids and solutions, and the suitability of said samples for analysis;
3. The extrapolation and interpretation of alcohol concentrations in bodily fluids;
4. The effect of alcohol on individuals and on their ability to operate a motor vehicle;
5. The theory and the operation of breath testing instruments and screening devices and interpretation of breath test results.

[2]

Ms. Hackett testified, consistent with her written report, Exhibit 2, that "using the second breath result (130 mg% at 4:35 am), I calculate that the individuals' BAC (blood alcohol content) would have been between 150 and 170 mg% at the time of the incident (02.35 hrs). This is assuming that no alcohol was consumed in the half hour prior to the time of the incident, nor between the time of the incident and the time of the breath test. Also, this calculation is independent of the subject's weight, height and gender."

Ms. Hackett testified that a slight change in the time of the alleged offence, to 2:40 am from 2:35 am would have only a very slight impact on her opinion, ie 150-170 mg% changed to 148-168 mg%.

Ms. Hackett indicated that a criteria of a proper breath test is that the result agrees, within 20 mg%, of another test result. For this reason, she referred to the breath test of the accused at 4:06 am as "invalid".

Ms. Hackett gave evidence of several explanations for a variance of greater than 20 mg% in breath test results other than that the instrument wasn't working properly or wasn't being operated properly. Her evidence on this point was consistent with that of Cst. Hillier.

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What constitutes a "sample of breath" under Section 258?

Defence argued that the first "sample" was the sample recorded by Cst. Hillier at 4:35 am. The Defence position was that an improper/insufficient sample or invalid sample does not constitute a sample under s. 258. In R. v. Perrier (1984), 15 CCC (3d) 506 the Ontario Court of Appeal held that "sample" is to be interpreted in conjunction with s. 254(3), meaning each sample which in the opinion of the qualified technician is necessary to enable a proper analysis to be made. In that case, where the volume of air entering the instrument was insufficient, and did not permit a proper analysis of the concentration of alcohol in the accused's blood it was found not to be a sample of breath per s. 258. In the present case there was no dispute and I find that the "attempt" at 4:00 am did not produce a "sample" per Section 258.

Cst. Hillier referred to the sample taken at 4:06am as a proper or valid sample. However, his evidence was that where there was a variance of 20 mg% or more between the result of the analysis of the first and second samples it was standard practice to take a third sample. Ms. Hackett testified that because the result was at variance with other breath test results by more than 20 mg% the sample was "invalid". Does that mean it does not constitute a sample of breath in relation to section 258(1)(c)? Section 258 does not state as a requirement that each sample

must be within 20 mg% of another. The question of what constitutes a sample of breath per s. 258 is relevant to whether or not the first sample of the accused's breath was taken not later than two hours after the time of the alleged offence. Given the Court's findings of fact regarding the breath sample times and the time the accused was in care or control, I need not answer the question of whether the sample at 4:06 am constituted a sample per s. 258 to resolve this case.

I accept that the sample taken at 4:35 am was a valid sample.

The Time Interval

Section 258 requires that the first sample be taken not later than two hours after the time of the alleged offence.

Cst. Waldorf testified that the accused's vehicle was stopped at "probably" 2:38 or 2:39 am. He called in the traffic stop at 2:40 am. He used his wristwatch to note the time. After speaking with the accused at his vehicle and then taking him back to the police vehicle, Cst. Waldorf recorded the time of reading the accused's right to counsel at 2:43 am.

Cst. Waldorf testified that he was present for and noted the times of the accused's breath tests using that same wrist watch. His recorded times matched the times

[2]

recorded by Cst. Hillier. Cst. Waldorf noted the first test at 4:06 am. He noted the second breath sample was taken from the accused by Cst. Hillier at 4:35 am.

I accept, as accurate, the times of the accused's care and control and breath tests as stated by Cst. Waldorf. I am satisfied that the time span between the time of the alleged offence and the time of the taking of the breath samples was accurately detailed in the evidence of Cst. Waldorf and confirmed by the evidence of Cst. Hillier and Exhibits VD1 and 3.

For the two hour requirement in s. 258(1)(c) not to have been satisfied, the Court must be left with a reasonable doubt that the accused continued to be in care or control of his motor vehicle until at least 2:35 am. On the totality of the evidence I am not left with such a doubt.

Even allowing for some rounding of the times to the nearest minute, I am persuaded beyond a reasonable doubt and find that the breath sample taken at 4:35 am was taken not later than two hours after the time of the alleged offence. Therefore, even if the sample of breath taken at 4:06 am did not constitute a "sample" per s. 258 and the sample at 4:35 am was the first "sample", I am satisfied it was taken not later than two hours after the alleged offence.

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Evidence to displace the presumption in s. 258(1)(c)

Cst. Hillier testified that on June 9, 2013, the approved instrument used to test the accused's breath was working properly. The instrument gave no Alerts.

He stated that five subjects were tested prior to the accused and one after the accused that night using the same approved instrument used to test the accused's breath. In the view of Cst. Hillier, the approved instrument functioned properly throughout.

In the opinion of Ms. Hackett, the fact that two samples of the accused's breath, at 4:35 am and 4:53 am showed the same blood alcohol content supported the conclusion that the instrument was functioning properly and the test results were repeatable. The 160 mg% test result could be explained by a number of variables other than a malfunction of the instrument or improper operation thereof. There was no evidence of the accused having burped or belched, two of the possible explanations. Ms. Hackett opined that the two readings of 130 mg% at 4:35 and 4:53 am showed that the analysis of the concentration of alcohol in the accused's blood was reliable.

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Given the evidence of Cst. Hillier and Ms. Hackett, the test result of 160 mg% neither alone, nor in the context of the evidence as a whole, raised a reasonable doubt in the Court's mind that the approved instrument was malfunctioning or was operated improperly or that the improper operation resulted in the determination that the concentration of alcohol in the accused's blood would not in fact have exceeded 80 mg of alcohol in 100 ml of blood at the time when the offence was alleged to have been committed.

I find the prerequisites in s. 258(1)(c) have been satisfied. Therefore, the Crown is entitled to the presumption of identity in s. 258(1)(c). Exhibit VD1 established proof beyond a reasonable doubt that at the time the accused was operating a motor vehicle his blood alcohol exceeded 80 mg of alcohol in 100 ml of blood.

Having concluded that proof of the accused's blood alcohol content at the time of the alleged offence was established by means of the Certificate of the Qualified Technician, the Court need not consider the alternative manner of proof put forth by the Crown. However, I shall comment upon it, briefly.

The Court found the evidence of Ms. Hackett credible and her opinion well founded. The Court found that the sample of breath given by the accused at 4:35

am on June 9, 2013 was valid and the analysis of the sample showed a blood alcohol content of 130 mg%.

The Court accepted Ms. Hackett's opinion that extrapolating back from the 130 mg% reading at 4:35 am, the accused's blood alcohol content at the time of the alleged offence was between 150 (148) and 170 (168) mg%.

This alternative means of proof of the accused's blood alcohol content at the time of the alleged offence also satisfied the Court that the accused's blood alcohol at that time exceeded 80 mg of alcohol in 100 ml of blood.

I am satisfied that all elements of the offence under s. 253(1)(b) have been proven beyond a reasonable doubt.

The Court finds the accused guilty on count 2.

s. 253(1)(a) offence

A conviction for impaired operation of a motor vehicle requires more than proof of the accused's impairment by alcohol. The Crown must prove the accused's ability to operate a motor vehicle was impaired by alcohol (or drug). Proof of impairment of the accused's ability to operate a motor vehicle to even the slightest degree

satisfies the legal requirement. R. v. Stellato, (1994) 2 S.C.R. 478n (SCC). Minor variations from normal conduct or minor signs of impairment may not provide a sufficient basis for a conviction. (R. v. Sampson, [2009] NSSC 191). The Court must consider the totality of the evidence.

The evidence relating to impairment was as follows:

The vehicle driven by the accused accelerated quickly when the light turned green at Albert Walker Blvd and North West Arm Drive. The vehicle proceeded on North West Arm Drive and stopped for a red light at Dunbrack Street. When the light turned green the vehicle proceeded. The vehicle pulled over promptly and parked properly at the curb when Cst. Waldorf, in the police car behind it, activated the emergency lights. The rapid acceleration from the stop light was the only unusual driving observed by Cst. Waldorf.

Cst. Waldorf described the accused's speech as obviously and distinctly slurred. Cst. Waldorf noted that the accused continued to slur his words throughout the time he was with the officer. He was unfamiliar with the accused's normal manner of speech.

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Cst. Waldorf noted the accused's actions in getting his papers, as requested, were very slow, almost slow motion.

He acknowledged that people can be nervous when dealing with the police. The accused, according to Cst. Waldorf had no difficulty understanding and following directions.

Cst. Waldorf described the accused's eyes as red and bloodshot. He agreed this could be caused by fatigue or allergies.

Cst. Waldorf described the accused as a little unsteady as he walked to the police car.

Cst. Waldorf detected a moderate smell of alcohol on the accused's breath.

Cst. Waldorf believed the accused's ability to operate a motor vehicle was impaired. At the police station the accused fell asleep twice. Cst. Waldorf agreed this could have been due to fatigue.

The accused's blood alcohol content at 4:35 am was 130 mg%. Expert witness, Josetta Hackett, opined that at the time the accused was operating a motor vehicle his blood alcohol was between 150 (148) and 170 (168) mg%. In her opinion, the

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ability to drive a motor vehicle of any person with a blood alcohol content of 100 mg% or more, is impaired. An individual with a blood alcohol content between 148 and 168 mg% would definitely have an impaired ability to operate a motor vehicle.

Cst. MacIsaac and Cst. McCormick had contact with the accused shortly after his release from custody by Cst. Waldorf. They each noted a smell of alcohol on the accused's breath, his eyes were glassy/bloodshot, he was very agitated and aggressive, yelling, he refused to leave the police lobby.

Cst. MacIsaac also noted the accused staggered on his feet. Both officers felt the accused was intoxicated. This evidence has been considered in light of the fact that the observations occurred approximately 2.5 hours after the alleged offence.

On the totality of the evidence, the Court is satisfied beyond a reasonable doubt that the accused's ability to operate a motor vehicle was impaired by alcohol on June 9, 2013, when he was operating a motor vehicle.

The court enters a stay on the s. 253(1)(a) count.

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